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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

ELLIS LAW GROUP, LLP,

Plaintiff, Cross-defendant and
Appellant,

v.

NEVADA CITY SUGAR LOAF PROPERTIES,
LLC,

Defendant, Cross-complainant and
Respondent.

C080930

(Super. Ct. No. 34-2010-
00067737CUBCGDS)

Ellis Law Group LLP (Ellis) pursued a lawsuit against Nevada City Sugar Loaf Properties, LLC (Sugar Loaf), George Mull and Marison Mull to recover unpaid legal fees and costs. Sugar Loaf eventually served Ellis with a Code of Civil Procedure

section 998¹ offer to compromise, offering a waiver of Sugar Loaf's recovery of costs in exchange for Ellis's dismissal of all claims against Sugar Loaf. Ellis did not accept the offer, but more than a year later it dismissed its complaint against Sugar Loaf without prejudice. Because Ellis did not accept the section 998 offer, Sugar Loaf obtained a trial court award of expert witness fees pursuant to section 998, subdivision (c).

Ellis now contends the trial court erred in concluding that Sugar Loaf's section 998 offer was enforceable. Finding no error, we will affirm the order awarding expert fees.

BACKGROUND

Ellis filed a second amended complaint against Sugar Loaf and the Mulls for breach of contract, quantum meruit and account stated. Sugar Loaf answered and filed a cross-complaint against Ellis for breach of fiduciary duty. The trial court granted Ellis's special motion to strike Sugar Loaf's cross-complaint and awarded Ellis \$14,553 in attorney's fees as the prevailing cross-defendant on that motion. Sugar Loaf's appeal from that attorney's fee order was decided by this court in 2014. (*Ellis Law Group, LLP v. Nevada City Sugar Loaf Properties, LLC* (2014) 230 Cal.App.4th 244.)

Meanwhile, Sugar Loaf served Ellis with an offer to compromise pursuant to section 998. Sugar Loaf offered to waive its costs in return for the dismissal with prejudice of all claims against it. Ellis did not accept the offer. But about 14 months later, Ellis dismissed its complaint against Sugar Loaf without prejudice.

Sugar Loaf moved for an award of \$21,377.08 in expert witness fees pursuant to section 998. Ellis opposed the motion, arguing Sugar Loaf had made a "token" section 998 offer with no reasonable prospect of acceptance. The trial court granted Sugar Loaf's motion for expert fees.

¹ Undesignated statutory references are to the Code of Civil Procedure.

DISCUSSION

Ellis contends the trial court erred in finding that Sugar Loaf's section 998 offer was enforceable. We disagree.

The version of section 998, subdivision (c)(1) in effect during the relevant time period provided: "If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff . . . shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court . . . , in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant." (Stats. 2005, ch. 706, § 13.)

"The policy behind section 998 is 'to encourage the settlement of lawsuits prior to trial.' " (*Martinez v. Brownco Construction Co.* (2013) 56 Cal.4th 1014, 1019.) To activate the cost-shifting provision of section 998, a settlement offer must be made in good faith, i.e., it must be realistically reasonable under the circumstances of the case and there must have been a reasonable prospect of acceptance. (*Najah v. Scottsdale Ins. Co.* (2014) 230 Cal.App.4th 125, 143 (*Najah*); *Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458, 470-471 (*Hartline*).) "[T]he potential for statutory recovery of expert witness fees and other costs provides parties 'a financial incentive to make reasonable settlement offers.' " (*Martinez, supra*, 56 Cal.4th at p. 1019.) " '[A] party having no expectation that his [or her] offer will be accepted "will not be allowed to benefit from a no-risk offer made for the sole purpose of later recovering large expert witness fees." ' " (*Bates v. Presbyterian Intercommunity Hospital, Inc.* (2012) 204 Cal.App.4th 210, 220 (*Bates*).) On the other hand, a party who refuses a reasonable settlement offer and subsequently fails to obtain a more favorable award may have to pay the offeror's reasonable costs. (*Adams v. Ford Motor Co.* (2011) 199 Cal.App.4th 1475,

1483 (*Adams*).) A plaintiff who voluntarily dismisses a complaint fails to obtain a more favorable judgment or award within the meaning of section 998, subdivision (c)(1), thereby triggering consideration of a defense cost award under that statute. (*Mon Chong Loong Trading Corp. v. Superior Court* (2013) 218 Cal.App.4th 87, 93-94.)

Ellis bore the burden of establishing in the trial court that Sugar Loaf's section 998 offer was unreasonable or that it was not made in good faith. (*Bates, supra*, 204 Cal.App.4th at p. 221.) And now, on appeal, Ellis bears the burden to establish that the trial court abused its discretion in finding that Sugar Loaf's offer was reasonable and made in good faith. (*Ibid.*; *Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 134 (*Nelson*).) We will not reverse the trial court's order unless Ellis demonstrates a clear abuse of discretion. (*Najah, supra*, 230 Cal.App.4th at p. 144.)

The reasonableness of a section 998 settlement offer is evaluated in light of the information available to the parties at the time the offer was made. (*Whatley-Miller v. Cooper* (2013) 212 Cal.App.4th 1103, 1112; *Burch v. Children's Hospital of Orange County Thrift Stores, Inc.* (2003) 109 Cal.App.4th 537, 548.) In the case of a defense section 998 offer, the fact that the offer was modest in comparison to the amount of damages the plaintiff sought does not preclude a finding of reasonableness because the amount of claimed damages is not the only factor to consider in determining reasonableness. (*Melendrez v. Ameron Internat. Corp.* (2015) 240 Cal.App.4th 632, 649 (*Melendrez*); *Essex Ins. Co. v. Heck* (2010) 186 Cal.App.4th 1513, 1530 (*Essex Ins. Co.*) [the plaintiff's subjective belief in the value of the case is not determinative]; *Culbertson v. R. D. Werner Co., Inc.* (1987) 190 Cal.App.3d 704, 710 (*Culbertson*).) The offer must also be evaluated in light of the plaintiff's likelihood to prevail. (*Melendrez, at p. 649.*)

Here, as the trial court found, Sugar Loaf "went to great lengths" to inform Ellis that its claim for unpaid attorney's fees was barred by a conflict of interest. An attorney may be required to forfeit fees where he or she represented clients with actual or potential conflicts of interest and failed to obtain the clients' informed written consent.

(*Mardirossian & Associates, Inc. v. Ersoff* (2007) 153 Cal.App.4th 257, 278; *Jeffry v. Pounds* (1977) 67 Cal.App.3d 6, 9-12; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 618.) Counsel for Sugar Loaf also told Ellis that Sugar Loaf never authorized Ellis to provide it with legal services and never received a statement of what was owed.

In opposition to Sugar Loaf's motion for expert fees, Mark Ellis averred he did not believe Sugar Loaf had a viable affirmative defense based on actual conflict of interest. But Ellis did not present any evidence to contradict the facts alleged in Sugar Loaf's supplemental interrogatory responses which indicated that the Mulls' and Sugar Loaf's interests were adverse. Rather, Ellis submitted a declaration that tended to support Sugar Loaf's contention that the Mulls' interests were not aligned with Sugar Loaf's. Nothing in the record shows that Sugar Loaf waived any actual or potential conflicts of interest in Ellis's representation; in fact, the trial court denied Ellis's summary adjudication motion because Ellis did not present evidence of such a waiver by Sugar Loaf. There is also no evidence that Ellis sent Sugar Loaf any statement for legal services or costs.

Unlike the circumstances in *Wear v. Calderon* (1981) 121 Cal.App.3d 818 (*Wear*), a case Ellis cites, Sugar Loaf resolutely notified Ellis of defenses which, if successful, could bar Ellis's causes of action. A trial court does not abuse its discretion in finding a defense offer to compromise reasonable where the defendant maintained it had a complete defense to the plaintiff's claims and there was a reasonable possibility that liability did not exist. (*Melendrez, supra*, 240 Cal.App.4th at pp. 649-651; *Najah, supra*, 230 Cal.App.4th at pp. 144-145; cf. *Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 700-701 (*Elrod*); *Wear, supra*, 121 Cal.App.3d at pp. 820-822.) Although counsel for Ellis averred that the decision to voluntarily dismiss the complaint against Sugar Loaf was based on economic considerations and not the merits, the trial court was not required to accept that representation. (*Bates, supra*, 204 Cal.App.4th at pp. 221-222.)

“When a defendant perceives himself to be fault free and has concluded that he has a very significant likelihood of prevailing at trial, it is consistent with the legislative purpose of section 998 for the defendant to make a modest settlement offer. If the offer is refused, it is also consistent with the legislative intent for the defendant to engage the services of experts to assist him in establishing that he is not liable to the plaintiff. It is also consistent with the legislative purpose under such circumstances to require the plaintiff to reimburse the defendant for the costs thus incurred.” (*Culbertson, supra*, 190 Cal.App.3d at pp. 706-707, 710-711 [the defendant’s settlement offer of \$5,000 was reasonable even though the plaintiff demanded \$1.5 million to settle his design defect claim where the defendant had strong evidence limiting or precluding its liability].)

Additionally, Sugar Loaf offered to waive its costs. About three years before it made its section 998 offer, Sugar Loaf represented it had about \$1,000 in costs. Given Sugar Loaf’s affirmative defenses and discovery responses, it should not have been a surprise that Sugar Loaf would retain experts on the issue of ethical and professional standards for attorneys. The trial court awarded Sugar Loaf \$21,377.08 in expert fees. We decline to characterize Sugar Loaf’s proposal as a “token” offer under the circumstances. (*Bates, supra*, 204 Cal.App.4th at p. 222 [waiver-of-costs offer had value because if accepted, it would have eliminated the offeree’s exposure to the very costs which were the subject of appeal]; *Adams, supra*, 199 Cal.App.4th at p. 1486 [same]; *Essex Ins. Co., supra*, 186 Cal.App.4th at pp. 1528-1529 [“no money” offer was not presumptively unreasonable].)

It is true that for a section 998 offer to be reasonable, “the plaintiff must have access to the facts that influenced the defendant’s determination that the offer was reasonable.” (*Adams, supra*, 199 Cal.App.4th at p 1485; see *Elrod, supra*, 195 Cal.App.3d at p. 699.) But Ellis does not identify the relevant information it did not have at the time Sugar Loaf made its section 998 offer. (*Arno v. Helinet Corp.* (2005)

130 Cal.App.4th 1019, 1027 (*Arno*); Cf. *Najera v. Huerta* (2011) 191 Cal.App.4th 872, 879; *Nelson, supra*, 72 Cal.App.4th at p. 136.)

Ellis argues Sugar Loaf's offer was not reasonable because at the time of the offer, the trial court had overruled Sugar Loaf's demurrer to Ellis's second amended complaint, granted Ellis's special motion to strike Sugar Loaf's cross-complaint, and awarded Ellis over \$12,000 in fees and costs. But those orders did not decide whether Ellis's claims were barred by a conflict of interest.

Ellis also claims the trial court incorrectly interpreted *Hartline, supra*, 132 Cal.App.4th 458, to require a finding of reasonableness based solely on the entry of a voluntary dismissal. Ellis says the trial court did not consider "all factors applicable to 'whether expert witness costs may be recovered by the defendant.' " (Italics omitted.) It also claims the trial court considered the reasonableness of Sugar Loaf's offer by looking at the circumstances present when Ellis dismissed its complaint. We disagree with Ellis's view of the trial court's analysis.

The trial court recognized that whether a section 998 offer was made in good faith requires an examination of the circumstances of the particular case and the information available to the parties at the time the offer was served. We find no error in the trial court's statement of the applicable analytical framework. The trial court considered Sugar Loaf's preoffer efforts to inform Ellis of its strong defenses. It also found that Sugar Loaf's section 998 offer was a reasonable prediction of the amount of money Sugar Loaf would have to pay following trial, suggesting that the trial court did not find Sugar Loaf's affirmative defenses to be unmeritorious. The trial court said Ellis knew the offer was reasonable because Sugar Loaf had repeatedly asserted the shortcomings of the complaint.

Ellis asserts it was reasonable for it to reject Sugar Loaf's "lowball" offer. But there is no " 'reasonable rejection exception' " to the operation of section 998.

(*Arno, supra*, 130 Cal.App.4th at p. 1027.) The trial court did not abuse its discretion in concluding that Sugar Loaf's section 998 offer was reasonable and made in good faith.

DISPOSITION

The order awarding expert fees is affirmed. Sugar Loaf is awarded its costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

/S/
MAURO, Acting P. J.

We concur:

HOCH, J.

/S/
RENNER, J.